Supreme Court, U.S.
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ALEXANDER L. STEVAS
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No. 82-5861

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

PATRICK E. TRIMBLE,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF MISSOURI

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Whether the imposition of the death sentence upon petitioner constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution because of surplusage in the punishment verdict of the jury.

2. Whether petitioner may raise constitutional claims in this Court which were never presented to the Supreme Court of Missouri or any other state court.

3. Whether the imposition of the death sentence upon petitioner constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments because evidence was admitted at trial that petitioner was charged with other crimes at the time of the murder, where this evidence was directly relevant to establish petitioner's motive and homicidal intent.

4. Whether the imposition of the death sentence upon petitioner constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments because the notice of aggravating circumstances did not specifically list the state's evidence relating to those aggravating circumstances, where this evidence was nevertheless disclosed to petitioner through regular discovery procedures.

5. Whether the imposition of the death sentence upon petitioner constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments because the prosecution referred to the possible range of punishment during the closing argument at the guilt stage, which reference was invited and solicited by the statements of defense counsel.

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OPINION BELOW

The opinion of the Supreme Court of Missouri, affirming petitioner's conviction of capital murder and sentence of death, is reported as State v. Trimble, 638 S.W.2d 726 (Mo. banc 1982).

STATEMENT OF THE CASE

Petitioner Patrick Edward Trimble was convicted of capital murder, §656.001, RSMo 1978, and was sentenced to death for the murder of Jerry James Everett, a fellow inmate of petitioner's in the St. Charles County Jail. The details of this crime, and the facts relating to petitioner's particular claims in this petition, are set out in the opinion of the Missouri Supreme Court, State v. Trimble, 638 S.W.2d 726 (Mo. banc 1982), and will not be restated here.

Of the five claims presently advanced by petitioner, four (claims 1, 3, 4 and 5) were raised by him at some stage of the state proceeding. The fifth (claim 2) has never been presented to any Missouri court.

ARGUMENT

1. The Jury's Punishment Verdict

In the first of his five allegations of constitutional error, petitioner asserts that the verdict of the jury imposing a sentence of death upon him was constitutionally invalid because (according to petitioner) the jury considered

and found an "aggravating circumstance" not submitted by instruction or authorized by law.

The absurdity of this characterization is apparent from the facts. At the punishment phase of trial, the jury was instructed upon two possible aggravating circumstances: that petitioner was in lawful custody at the time he committed the murder, § 565.012.2(9), RSMo 1978; and that petitioner murdered the victim for the purpose of avoiding a lawful arrest, § 565.012.2(10). See State v. Trimble, 638 S.W.2d 726, 731 (Mo. banc 1982). In the course of its deliberation, the jury sent a question to the court asking whether it could simply put on the verdict form "'that at the time of the murder of Jerry Everett the defendant was in the lawful custody of a place of confinement,'" or whether it was required to go into "lengthy detail," as to its reasons for the death sentence. Id. at 731-732. The court replied, with the concurrence of appellant, that it could not answer their question. Id. Four minutes after this communication, the jury returned the following verdict:

> "We, the jury, having found the defendant Patrick E. Trimble guilty of the capital murder of Jerry James Everett, fix the defendant's punishment at death, and we designate the following aggravating circumstance or circumstances which we find beyond a reasonable doubt: that at the time of the murder of Jerry James Everett the defendant was in the lawful custody of a place of confinement and as a

deterrent to future acts of violents [sic]" (emphasis supplied).

As is readily evident from these facts, petitioner's description of the above-emphasized language as an aggravating circumstance" is fallacious. To the contrary, this is nothing more than an instance in which the jury, being uncertain as to the degree of specificity required in its verdict, set out one of the factors it considered in its deliberations in addition to specifying the statutory aggravating circumstance it found. It is unclear whether the jury's intended deterrence of violence is directed at petitioner himself ("incapacitation"), to the community as a whole, or a combination of both. In any case, it is frivolous for petitioner to suggest that the jury is somehow forbidden from considering the possibility of deterrence as a factor in its decision. Deterrence (both of the offender and the community) is one of the major policies in support of capital punishment. Gregg v. Georgia, 428 U.S. 153, 183-186, 226 (1976). While the individualized consideration of each crime and defendant is essential in the capital sentencing process, Id. at 189, neither authority nor logic supports the proposition that the jury may not also consider the purposes behind capital punishment in deciding whether or not to impose it. Obviously, had the present jury indicated that it felt that the death penalty was not a deterrent and had consequently declined to impose it, petitioner would now be eminently silent. It has long been recognized that surplusage in a jury verdict does not invalidate that verdict.

United States v. Lee, 532 F.2d 911, 914 (3rd Cir. 1976), cert. denied, 429 U.S. 898 (1976); United States v. Howard, 507 F.2d 559, 563 (8th Cir. 1974). Such is the case here.

The case at bar is different from Barclay v. Florida, No 81-6908 (certiorari granted November 8, 1982); and Zant v. Stephens, No. 81-89 (certiorari granted October 5, 1981), both currently before this Court. In these cases, the issue is whether a death sentence based upon a finding of several aggravating circumstances is voided when some but not all of the aggravating circumstances are found invalid or unconstitutional; the theory of the petitioners therein is essentially that the invalid aggravating circumstances "taint" the verdict because the jury might have based its decision on facts or factors not properly before it.[1] In the present case, however, it is undisputably the fact that no extraneous evidence or submission of any kind were made to the jury - rather, the jury deliberated solely upon facts and circumstances legitimately before it. That being the case, it cannot reasonably be said that the jury's verdict as to punishment was violative of petitioner's constitutional rights.

2. Validity of Aggravating Circumstance

Petitioner next attacks the validity of the aggravating circumstance found in this case, that "[t]he capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement,"

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[1]The fallacies of that rationale are addressed in the amicus curiae brief on behalf of thirteen states in Zant v. Stephens, supra.

§ 565.012.2(9), RSMo 1978. According to petitioner, "in cases such as this the death penalty violates the Eighth Amendment where it is imposed based solely on a person's status as an inmate" (petition at 15).

An initial major difficulty with this contention is that it has never been presented to the state courts but rather is advanced for the first time in this petition. As this Court has noted:

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system" (citations omitted). Webb v. Webb, 451 U.S. 493, 496-497 (1981).

See also Sandstrom v. Montana, 442 U.S. 510, 527 (1979). Petitioner's failure to raise his present challenge in the Missouri Supreme Court is evident (and may be presumed) from the fact that that court did not address the issue in its opinion. Street v. New York, 394 U.S. 576, 582 (1969). Accordingly, this theory is not properly reviewable here.

In any event, this aggravating circumstance is valid on its face and as applied. Section 565.012.2(9) is taken directly from the Georgia statute which was upheld by this Court in Gregg v. Georgia, supra, 428 U.S. at 196-198. Contrary to petitioner's assertion (petition at 15-16), its legitimate purpose is to present or punish murders by any

person in the lawful custody of the state; no constitutional distinction exists between murders by a convicted person and those who (like petitioner) has been charged with a crime but has not as yet been convicted of it. Finally, the application of this aggravating circumstance to petitioner not only does not render it "vague," it is uniquely appropriate to petitioner's crime. While in the St. Charles County Jail on charges of kidnapping, raping, sodomizing and sexually abusing two nine-year-old girls, and fully knowing that he was guilty of these crimes and that he would probably be convicted, petitioner decided to commit a murder so that he would have a more favorable status with his fellow prison inmates. State v. Trimble, supra, at 730. So saying, he tortured, sexually abused and murdered another prisoner at the jail. Id. at 730-731. In short, since petitioner himself undisputably committed the present murder solely on the basis of his status as a person in custody, it is absurd for petitioner to contend that the aggravating circumstance at issue is "vague" when it was applied to him for precisely that reason. Godfrey v. Georgia, 446 U.S. 420 (1980).

3. Evidence of Other Crimes.

Third, it is asserted that petitioner's due process rights were violated when the state was allowed to introduce evidence that he had been charged with rape and sodomy at the time of the murder.

As extensively set out in the opinion of the Missouri Supreme Court, State v. Trimble, supra at 730, 732-733, this evidence was directly and uniquely relevant to petitioner's motive in committing the murder and the degree of his criminal intent

in doing so. The same evidence would have been admissible under federal law, Rule 404(b), Rederal Rules of Evidence, and state evidentiary rules which are even more liberal in admitting evidence of prior convictions have been upheld by this Court. Spencer v. Texas, 385 U.S. 554, 559-569 (1967). No colorable constitutional issue is presented here.

4. Notice of Aggravating Circumstances

Under §565.006.2, RSMo 1978, as interpreted in State v. Trimble, supra, at 735, the state is required to give notice to the defendant prior to trial regarding any aggravating circumstance which may be submitted at the punishment phase of trial. Under the Missouri rule on discovery, the state is obligated to disclose the names of all potential witnesses and other information whereby the evidence supporting the aggravating circumstances may be determined. Id. Petitioner now asserts that §565.006.2 is unconstitutional because it does not require that all items of evidence relating to the aggravating circumstances be listed in the notice.

This assertion refutes itself. Unquestionably, the defendant is entitled to the disclosure of potential evidence in aggravation. Gardner v. Florida, 430 U.S. 349, 361 (1977). However, the disclosure of potential witnesses and evidence relating to crime and punishment is already provided for under Missouri law, and there is not the slightest evidence (or even an allegation) that full and proper disclosure was not made. Rather, petitioner simply feels that it would be more convenient for him if each and every item of evidence

potentially relevant to any aggravating circumstance was separately listed in the notice. As the Missouri Supreme Court observed, "[w]e decline the invitation to read useless requirements into the statute." State v. Trimble, supra, at 735. Equally, petitioner's attempt to insert a trivial and hypertechnical requirement into the notice statute presents no legitimate constitutional issue.

5. Reference to Range of Punishment at Guilt Stage

Finally, petitioner contends that his conviction violates the constitution because the prosecution made reference to the range of punishment for the crime charged and the lesser included offenses submitted during the closing argument of the guilt stage of trial. His assertion that this was "contrary to Section 565.006, RSMo" (petition at 19) is erroneous, since that statute merely provides that punishement is not at issue in the guilt stage, not that it may not be referred to.

It is difficult to perceive how petitioner may assert that his constitutional rights were violated when he invited the reference in question; prior to closing argument, defense counsel himself stated his intention to refer to the range of punishment. State v. Trimble, supra, at 734. In any event, petitioner cites no authority, and respondent is aware of none, which has ever held that a reference to the range of punishment at the guilt phase is prohibited by the United States Constitution. Given the fact that the prosecution is entitled to advise the jury panel during voir dire that one possible punishment for capital murder is death--the

punishment ultimately imposed upon petitioner in this case--such a claim would appear to be meritless on its face. Witherspoon v. Illinois, 391 U.S. 510 (1968).

CONCLUSION

In view of the foregoing, the respondent respectfully submits that petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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